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[REDACTED]

**STATE OF WISCONSIN**  
**Division of Hearings and Appeals**

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In the Matter of

Office of the Inspector General, Petitioner

DECISION

v.

[REDACTED], Respondent

FOF/167103

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**PRELIMINARY RECITALS**

Pursuant to a petition filed under Wis. Admin. Code §HA 3.03 and 7 C.F.R. § 273.16, to review a decision by the Office of the Inspector General to disqualify [REDACTED] from receiving FoodShare benefits (FS) for a period of one year, a hearing was held on October 14, 2015, at Milwaukee, Wisconsin.

The issue for determination is whether the Respondent committed an Intentional Program Violation (IPV).

This hearing was originally scheduled for a telephone hearing on August 18, 2015. At the Respondent's request, the hearing was rescheduled, because he moved and had recently received the forwarded notice and exhibits. His address was updated, accordingly.

The hearing was then scheduled for a phone hearing on September 8, 2015. At that time, the Respondent indicated that he wanted an in-person hearing because he was hearing impaired. The Respondent also indicated that he was not receiving his mail at the address he provided on August 18<sup>th</sup> and that he was actually homeless.

The hearing was rescheduled to October 14, 2015. A notice was mailed to the Respondent at 1220 W. Vliet St., the mailing address used for homeless individuals. The Petitioner did not appear for the hearing.

On October 30, 2015, an e-mail was sent to the Respondent to see if he received the notice for the October 14, 2015 hearing. The e-mail address was one the Respondent provided on September 8, 2015. As of the date this decision was written on November 9, 2015, the Respondent had not replied to the e-mail inquiry.

There appeared at that time and place the following persons:

**PARTIES IN INTEREST:**

**Petitioner:**

Department of Health Services  
Division of Health Care Access and Accountability  
1 West Wilson Street, Room 651  
Madison, Wisconsin 53703

By: Tanya Allen, Fraud Investigator  
Office of the Inspector General

Department of Health Services  
1 West Wilson Street  
Madison, WI 53701

Respondent:

[REDACTED]  
[REDACTED]  
[REDACTED]

ADMINISTRATIVE LAW JUDGE:  
Mayumi M. Ishii  
Division of Hearings and Appeals

### **FINDINGS OF FACT**

1. The Respondent (CARES # [REDACTED]) received FoodShare benefits from January 2013 through August 2015. (Exhibit 1C)
2. On November 10, 2012, the Respondent completed an ACCESS application in which he indicated he was homeless, but living in Wisconsin. The application contained a penalty warning, advising the Respondent that he could be disqualified from the FoodShare program for giving false information. The Respondent electronically signed the application, indicating that the information was correct and complete and that he understood the penalties for providing the false information or breaking the rules. (Exhibit 4A)
3. On November 11, 2013, the county agency generated an Application Summary, which indicated that the Respondent was homeless but living in Milwaukee. The Respondent electronically signed the application, indicating that the information was correct and complete and that he understood the penalties for providing false information or breaking the rules (Exhibit 3C)
4. On November 14, 2014, the county agency generated an Application Summary, which indicated the Respondent was homeless but living in Wisconsin. The Respondent electronically signed the application, indicating the information was correct and completed and that he understood the penalties for providing false information or breaking the rules. (Exhibit 3E)
5. In November 2012, November 2013 and November 2014, the county agency sent the Respondent an Eligibility and Benefits booklet that advised the Respondent about the consequences of providing false information, including disqualification from the FoodShare program. (Exhibits 3A and 4B)
6. The Respondent's EBT card was used exclusively in Las Vegas, Nevada between May 2013 and December 2014. (Exhibit 4C)
7. The Respondent obtained employment with a staffing agency from May 2014 to August 2014. The Respondent provided this employer with an address in Las Vegas, Nevada. (Exhibit 4F)

8. In September of 2014, an individual with the Respondent's name was charged with marijuana possession in Nevada, though the individual's address is not listed in the court record. A bench warrant for the individual was issued a month later. (Exhibit 4E)
9. The Respondent obtained employment at a different staffing agency from January to May 2015. The Respondent reported an address in Las Vegas, Nevada to that employer. (Exhibit 4D)
10. On July 10, 2015, OIG prepared an Administrative Disqualification Hearing Notice alleging that the Respondent lied about his residence between December 1, 2013 and February 28, 2015. (Exhibit 6)

### **DISCUSSION**

#### *Respondent's Non-appearance*

The Respondent did not appear for this hearing. This circumstance is governed by the regulation in 7 C.F.R. §273.16(e)(4), which states in part:

If the household member or its representative cannot be located or fails to appear at a hearing initiated by the State agency without good cause, the hearing shall be conducted without the household member being represented. *Even though the household member is not represented, the hearing official is required to carefully consider the evidence and determine if intentional Program violation was committed based on clear and convincing evidence.* If the household member is found to have committed an intentional program violation but a hearing official later determines that the household member or representative had good cause for not appearing, the previous decision shall no longer remain valid and the State agency shall conduct a new hearing. The hearing official who originally ruled on the case may conduct a new hearing. In instances where the good cause for failure to appear is based upon a showing of nonreceipt of the hearing notice, the household member has 30 days after the date of the written notice of the hearing decision to claim good cause for failure to appear. In all other instances, *the household member has 10 days from the date of the scheduled hearing to present reasons indicating a good cause for failure to appear. A hearing official must enter the good cause decision into the record.*

*Emphasis added*

The hearing in this case took place on October 14, 2015. The Respondent was advised of the date, time and location of the hearing in a notice that was sent to him at 1220 West Vliet Street. There is no record of any returned mail. The Respondent did not appear for the hearing.

On October 30, 2015, the Respondent was sent an e-mail, at an address that he provided, to double check whether he had received the hearing notice. The Respondent did not reply to the e-mail.

The Respondent did not appear at the hearing; he did not contact the Division of Hearings and Appeals within 10 days to explain his failure to appear and he did not respond to a subsequent inquiry to see if he had received the hearing notice. As such, it is found that the Respondent did not have good cause for his non-appearance.

#### *What is an IPV?*

An IPV is defined at 7 C.F.R. §273.16(c) as intentionally: making a false or misleading statement or misrepresenting; concealing or withholding facts; or committing any act that constitutes a violation of the

Food Stamp Act, federal regulations or any Wisconsin statute relating to the use, presentation, transfer, acquisition, receipt or possession of food stamp coupons or an authorization to participate (ATP) card.

The Department's written policy restates federal law, below:

### **3.14.1 IPV Disqualification**

7 CFR 273.16

A person commits an Intentional Program Violation (IPV) when s/he intentionally:

1. makes a false or misleading statement, or misrepresents, conceals or withholds facts; or
2. commits any act that constitutes a violation of the Food Stamp Act, the Food Stamp Program Regulations, or any Wisconsin statute for the purpose of using, presenting, transferring, acquiring, receiving, possessing or trafficking of FoodShare benefits or QUEST cards.

An IPV may be determined by the following means:

1. Federal, state, or local court order,
2. Administrative Disqualification Hearing (ADH) decision,
3. Pre-charge or pretrial diversion agreement initiated by a local district attorney and signed by the FoodShare recipient in accordance with federal requirements, or
4. Waiver of the right to an ADH signed by the FoodShare recipient in accordance with federal requirements.

*FoodShare Wisconsin Handbook, §3.14.1.*

The agency may disqualify only the individual who either has been found to have committed the IPV or has signed a waiver or consent agreement, and not the entire household. If disqualified, an individual will be ineligible to participate in the FS program for one year for the first violation, two years for the second violation, and permanently for the third violation. However, any remaining household members must agree to make restitution within 30 days of the date of mailing a written demand letter, or their monthly allotment will be reduced. 7 C.F.R. §273.16(b).

### *What is the Agency's Burden of Proof?*

In order for the agency to establish that a FS recipient has committed an IPV, it has the burden to prove two separate elements by clear and convincing evidence. The recipient must have: 1) committed; and 2) intended to commit an intentional program violation per 7 C.F.R. §273.16(e)(6).

"Clear and convincing evidence" is an intermediate standard of proof which is more than the "preponderance of the evidence" used in most civil cases and less than the "beyond a reasonable doubt" standard used in criminal cases.

In Kuehn v. Kuehn, 11 Wis.2d 15, 26 (1959), the court held that:

Defined in terms of quantity of proof, reasonable certitude or reasonable certainty in ordinary civil cases may be attained by or be based on a mere or fair preponderance of the evidence. Such certainty need not necessarily exclude the probability that the contrary conclusion may be true. In fraud cases it has been stated the preponderance of the evidence should be clear and satisfactory to indicate or sustain a greater degree of certitude. Such degree of certitude has also been defined as being produced by clear, satisfactory, and convincing evidence. Such evidence, however, need not eliminate a reasonable doubt that the alternative or opposite conclusion may be true. In criminal

cases, while not normally stated in terms of preponderance, the necessary certitude is universally stated as being beyond a reasonable doubt.

*Wisconsin Jury Instruction – Civil 205* is also instructive. It provides:

Clear, satisfactory and convincing evidence is evidence which when weighed against that opposed to it clearly has more convincing power. It is evidence which satisfies and convinces you that “yes” should be the answer because of its greater weight and clear convincing power. “Reasonable certainty” means that you are persuaded based upon a rational consideration of the evidence. Absolute certainty is not required, but a guess is not enough to meet the burden of proof. This burden of proof is known as the “middle burden.” The evidence required to meet this burden of proof must be more convincing than merely the greater weight of the credible evidence but may be less than beyond a reasonable doubt.

Further, the *McCormick* treatise states that “it has been persuasively suggested that [the clear and convincing evidence standard of proof] could be more simply and intelligibly translated to the jury if they were instructed that they must be persuaded that the truth of the contention is highly probable.” 2 *McCormick on Evidence* § 340 (John W. Strong gen. ed., 4<sup>th</sup> ed. 1992).

Thus, in order to find that an IPV was committed, the trier of fact must derive from the evidence, a firm conviction that the Petitioner sold her FoodShare benefits, even though there may exist a reasonable doubt that the opposite is true.

#### *The Merits of OIG’s Case*

In the case at hand, OIG asserts that the Respondent intentionally violated the rules of the FoodShare program by lying about his residence from December 2013 through February 2015.

“A household shall live in the State in which it files an application for participation” in the food stamp program. 7 *CFR* §273.3(a)

It is clear from the November 2012, November 2013, and November 2014 applications / application summaries that the Respondent reported living in Wisconsin. The Respondent’s EBT card analysis shows that the Petitioner’s EBT card usage was exclusively in Las Vegas, Nevada from December 2013 through December 2014. (The report does not show transactions more recent than December 2014) It is highly unlikely that the Respondent was living in Wisconsin, but only grocery shopping in Nevada during this time.

It should be noted that a Work Number report shows that the Respondent was working for a staffing agency in January and February 2015 and reported to that employer, a Las Vegas address.

Based upon all of the foregoing, it is found that the Respondent provided false information from December 2013 through February 2015 by claiming to be a Wisconsin resident when, in fact, he lived outside the state.

There is a general rule that a person is presumed to know and intend the probable and natural consequences of his or her own voluntary words or acts. See John F. Jelke Co. v. Beck, 208 Wis. 650 (1932); 31A C.J.S. Evidence §131. Intention is a subjective state of mind to be determined upon all the facts. Lecus v. American Mut. Ins. Co. of Boston, 81 Wis.2d 183 (1977). There is nothing in the record to rebut the presumption that the Respondent intentionally lied to Wisconsin authorities about his residence in order to obtain FoodShare benefits. On the contrary, the Respondent was warned about the

penalties for providing false information when he completed the November 2012 application and when he received the Eligibility and Benefits booklets, but he lied about his residence, anyway.

### **CONCLUSIONS OF LAW**

OIG has shown by clear and convincing evidence that the Respondent intentionally violated the rules of the FoodShare program by lying about his residence.

This is the first such violation.

**THEREFORE, it is**

### **ORDERED**

That the IPV for claim number [REDACTED] is sustained and that the Respondent is hereby ineligible to participate in the FoodShare program for a period of one year, effective the first month following the date of receipt of this decision.

### **REQUEST FOR A REHEARING ON GROUNDS OF GOOD CAUSE FOR FAILURE TO APPEAR**

In instances where the good cause for failure to appear is based upon a showing of non-receipt of the hearing notice, the respondent has 30 days after the date of the written notice of the hearing decision to claim good cause for failure to appear. See 7 C.F.R. sec. 273.16(e)(4). Such a claim should be made in writing to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875.

### **APPEAL TO COURT**

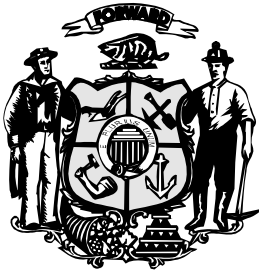
You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, Madison, WI 53703, **and** on those identified in this decision as “PARTIES IN INTEREST” **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing request (if you request one).

The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of Milwaukee,  
Wisconsin, this 9th day of November, 2015.

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\sMayumi M. Ishii  
Administrative Law Judge  
Division of Hearings and Appeals



**State of Wisconsin\DIVISION OF HEARINGS AND APPEALS**

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The preceding decision was sent to the following parties on November 9, 2015.

Office of the Inspector General  
Public Assistance Collection Unit  
Division of Health Care Access and Accountability  
[tanya.allen@wisconsin.gov](mailto:tanya.allen@wisconsin.gov)